

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: PCS/SB 2170 (325006)

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Commission on Ethics/Ethics Public Trust

DATE: March 19, 2010

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Kruse | Rubinas | EE | Favorable |
| 2. | Naf | Wilson | GO | Pre-meeting |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill saves from repeal the public-records exemption for a complaint or any records relating to the complaint or to any preliminary investigation by the Commission on Ethics or a Commission on Ethics and Public Trust established by a county or a municipality. The bill also saves from repeal the public-meetings exemption for any proceedings regarding a complaint or preliminary investigation conducted by either commission.

These exemptions are subject to review under the Open Government Sunset Review Act (the Act).¹ These exemptions will expire on October 2, 2010, unless saved from repeal through reenactment by the Legislature.

This bill also restructures the exemptions into separate subsections for records and proceedings.

Because this bill does not create or expand an existing public-records or public-meetings exemption, it does not require a two-thirds vote of each house of the Legislature for passage.

¹ Section 3, ch. 2005-279, L.O.F.

This bill amends s. 112.324, F.S.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency³ records are to be available for public inspection.

Section 119.011(12), F.S., defines the term “public record” to include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are

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³ Section 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

“intended to perpetuate, communicate, or formalize knowledge.”⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹³ An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.¹⁴ An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which ... would be defamatory ... or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is

⁴ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁸ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Section 24(c), art. I of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ *Id.*

used to protect or further a business advantage over those who do not know or use it, the disclosure of which ... would injure the affected entity in the marketplace.¹⁵

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁶

Commission on Ethics

The Commission on Ethics (Commission) is a non-paid, appointed body consisting of nine members.¹⁷ The Commission serves as guardian of the standards of conduct for officers and employees of the state and of a county, city, or other political subdivision of the state.¹⁸

Current law establishes the duties and powers of the Commission.¹⁹ Chief among these responsibilities is the duty to receive and investigate sworn complaints of violation of the code of ethics and of any other breach of the public trust,²⁰ including investigation of all facts and parties materially related to the complaint.

A county or municipality also has the authority to create a Commission on Ethics and Public Trust.

Exemptions under Review

Current law provides a public-records exemption for a complaint or any records relating to the complaint or to any preliminary investigation by the Commission or a Commission on Ethics and Public Trust established by a county or a municipality. The complaint and associated records are confidential and exempt from public-records requirements.²¹ In addition, any proceedings regarding a complaint or preliminary investigation are exempt from public-meetings requirements. Such exemptions no longer apply when the:

- Complaint is dismissed as legally insufficient;
- Alleged violator requests in writing that the records and proceedings be made public; or
- Commission or Commission on Ethics and Public Trust determines whether probable cause exists to believe that a violation has occurred.²²

¹⁵ *Id.*

¹⁶ Section 119.15(6)(a), F.S.

¹⁷ Section 112.321(1), F.S.

¹⁸ Section 112.320, F.S.

¹⁹ *See* s. 112.322, F.S.

²⁰ As provided in s. 8(f), art. II of the State Constitution.

²¹ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

²² Section 112.324(2)(a), F.S.

In 2005, the Legislature applied the public-records and public-meetings exemptions to a Commission on Ethics and Public Trust established by a municipality.²³ As such, pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2010, unless reenacted by the Legislature.

III. Effect of Proposed Changes:

The bill removes the repeal date, thereby reenacting the public-records and public-meetings exemptions. The bill also restructures the exemptions into separate subsections for records and proceedings.

The effective date of the bill is October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains existing public-records and public-meetings exemptions. Because the bill does not create or expand an existing exemption, it does not require a two-thirds vote of each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

²³ Chapter 2005-185, L.O.F.

VII. Related Issues:

None.

VIII. Additional Information:

- A. Proposed Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Proposed Committee Substitute and the prior version of the bill.)

PCS by Governmental Oversight and Accountability on March 23, 2010:

The proposed committee substitute makes clarifying technical changes.

- B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
